No. 87-1274

IN THE

Supreme Court Of The United States

October Term, 1987

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC;
UNITED STEELWORKERS OF AMERICA, on behalf
of its LOCAL UNION 14530,

Petitioners,

vs.

CHEROKEE ELECTRIC COOPERATIVE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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16 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Where it is undisputed that a grievance under a collective bargaining agreement was not filed or reported within the time limits required by such contract and it is also undisputed that such time limits were never mutually extended by the parties or waived by the employer, can the employer nevertheless be compelled to proceed to arbitration where the collective bargaining agreement specifically states that the grievance is deemed waived, non-existent and/or settled in favor of the employer?

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Respondent Cherokee Electric Cooperative hereby asserts its opposition to the petition for a writ of certiorari and respectfully urges that the granting of such a writ is not warranted in this case for the reasons set forth below.

STATEMENT OF THE CASE

Respondent Cherokee Electric Cooperative (hereinafter referred to as the "Company") refused to accede to the demand of the Petitioners (hereinafter referred to as the "Union") that it proceed to arbitration on Grievance No. 62. The Company so refused because this grievance was waived and non-existent under the terms of the collective bargaining agreement. The

Union then brought this action in the District Court to compel the Company to proceed to arbitration on the grievance. Ultimately, both the Union and the Company filed respective motions for summary judgment, and the District Court thereafter granted judgment to the Company.

The facts upon which the District Court based its grant of summary judgment to the Company were undisputed. The Union and the Company were parties to a Collective Bargaining Agreement entered into effective June 4, 1985. Article 11 of the Agreement governs the grievance and arbitration procedure which the Company and the Union are subject to. This grievance procedure contains certain time limits within which a grievance must be initially reported, and within which the subsequent steps must be invoked. Article 11, Section 2, Step 1 provides in pertinent part as follows:

> The employee must report a grievance to his or her immediate supervisor within five (5) work days after employee's first knowledge of the occurrence causing the grievance. If the immediate supervisor is not available, the grievance shall be reported for the record to the Department Head, or his or her designated representative. Any grievance not reported within five (5) working days of first knowledge of the occurrence causing the grievance shall be deemed waived and non-existent.

Additionally, Article 11, Section 3, states in pertinent part as follows:

> Failure of the Cooperative or the Union to take the required action(s) or meet within the time limits, or any mutually agreed extension(s) thereof prescribed in Section 2 above, shall be deemed a settlement of the grievance in favor of the party in whose favor the default runs.

In support of its motion for summary judgment, the Company presented affidavits and documentation which established that Grievance No. 62 was not timely filed under the requirements of the Collective Bargaining Agreement, and that the time limits pertaining to such grievance were never extended or waived by the Company. In support of its own motion for

summary judgment, and in response to the Company's motion, the Union presented absolutely nothing to show that the grievance was arguably either timely filed or that the contractual time limits were extended or waived by the Company. The Union did not even advance a theory or a color of an argument as to how this grievance could be deemed other than having been waived and non-existent.[1]

Based upon what was clearly the non-existence of the issue, rather than what the Union now tries to characterize as a disputed issue, the District Court held as follows in its Memorandum Opinion which appears at pp. 13a to 14a of the Appendix to the Union's Petition:

> "Applying the reasoning used by the Eleventh Circuit in *Mosher Steel* to the facts of this case, this court concludes that in order to be entitled to present the issue of the timeliness of a grievance to an arbitrator, the issue must have been legitimately raised by the Union so that there is a bona fide procedural timeliness question to be determined by the arbitrator. In this case there is no legitimate question of timeliness since the Steelworkers have, in effect, conceded that the grievance was not timely filed by failing to dispute it in their pleadings and failing to support any such contention by affidavits, depositions, answers to interrogatories, or admissions. This court finds that Cherokee Electric did not agree to submit to arbitration grievances which on their face are untimely and to which the timeliness issue is not disputed, and that the Collective Bargaining Agreement expressly excludes such issues from arbitration."

After hearing oral argument, the Court of Appeals affirmed the District Court's judgment *per curiam* for the reasons stated

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[1]The Union is now asserting in the "Statement of the Case" portion of its Petition and in Footnote 4, commencing at page 14 of its Petition, certain factual allegations and theories in an attempt to now portray Grievance No. 62 as having arguably been filed in a timely fashion, or as having the time limits pertaining thereto waived by the Company. As will be discussed fully in the argument portion of this brief which follows, none of these contentions were made at the District Court or Court of Appeals levels, and much of what the Union now asserts has no factual basis in the record.

in the District Court's Memorandum Opinion (Appendix to Petition, p. 1a). The Court of Appeals thereafter denied the Union's petition for a rehearing and suggestion of rehearing *en banc*. (Appendix to Petition, pp. 2a-3a).

REASONS FOR DENYING THE WRIT

The decision of the District Court, which the Eleventh Circuit affirmed *per curiam*, found that there simply was no procedural question to be decided. Therefore, under the terms of the collective bargaining agreement involved, the subject grievance was deemed waived and non-existent. This decision does not conflict with the decisions of this Court and those of other Circuits, since most of these prior decisions have recognized, either directly or implicitly, the existence of an actual question of procedure to be left to the province of arbitration.

I. The Union cannot now properly assert the actual existence of a procedural issue concerning the subject grievance.

Before the District Court the Union failed to present any evidence which would establish that an issue actually existed concerning the timeliness of Grievance No. 62, or that would establish that the time limits applicable had been waived by the Company. More significantly, the Union failed to dispute the untimeliness in its pleadings, and further failed to advance even a theory or a color of a claim as to how the grievance could be deemed other than having been waived and non-existent. Nowhere in its own motion for summary judgment, its brief in support thereof, or its brief in opposition to the Company's motion for summary judgment did the Union even suggest to the District Court how an issue could arguably exist. The District Court quite properly concluded that no issue did exist.

On its appeal to the Circuit Court the Union was consistent with the record it established (or failed to establish) in the District Court. Nowhere in its principal brief, its reply brief,

or its petition for rehearing did the Union argue or even suggest the existence of facts which might establish the timeliness of the grievance or the waiver of its untimeliness. Neither did it suggest any theory or make any argument as to how this grievance could be viewed as other than waived and non-existent. Counsel for the Union at the Appellate Court level maintained this position even in response to a direct question by a member of the panel of the Eleventh Circuit inquiring as to any possible reasons why this grievance could be deemed other than waived and non-existent. The Union simply refused to give any reasons.

Now, in support of the instant Petition the Union is attempting to portray the existence of a real issue. In a portion of its "Statement of the Case," appearing principally at pages 5 through 7 of its Petition, the Union suggests for the first time in this proceeding that the Company arguably waived any untimeliness through its preliminary handling of the grievance, and then did not raise a timeliness objection until July 10, 1986. The Union takes even further license in Footnote 4, appearing at pages 14 and 15 of its Petition. Here the Union attempts to bootstrap a novel waiver argument based upon the timing of the issuance of an arbitrator's decision dealing with other prior grievances. The attempt now being made through Footnote 4 has no support in the record of this proceeding.

The theory that there is, after all, an actual issue as to the timeliness or waiver of the untimeliness of Grievance No. 62 is now being raised for the first time. The Union cannot properly attempt to do such at this point. *Minnich v. Gardner*, 292 U.S. 48, 53 (1954); *Seaboard Coast Line Railroad Company v. National Rail Passenger Corporation*, 554 F.2d 657, 660 (5th Cir. 1977); *National Railroad Passenger Corporation v. Missouri Pacific Railroad Company*, 501 F.2d 423, 426, n. 3 (8th Cir. 1974).

In considering whether to grant the instant Petition, this Court is respectfully urged not to consider this to be an instance where an issue of timeliness exists. The Union failed and refused to even suggest the actual existence of an issue in the

lower courts. It cannot properly do so now. It was therefore quite correct for the District Court to conclude that a procedural issue was not presented.

II. The decisions of the Courts below are not directly contrary to this Court's prior decisions.

The argument advanced by the Union's Petition greatly overstates the scope of the District Court's determination and the affirmance of such by the Eleventh Circuit. The District Court did not determine the merits of any issue of timeliness, but rather determined that there simply was no issue. The resulting refusal of the courts below to compel the Company to proceed to arbitration on a non-issue does not appear to be at odds with this Court's decision in, *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). In *Wiley*, this Court noted the existence of a legitimate question as to timeliness and stated as follows at 376 U.S. 557:

> "In this case, for example, the Union argues that Wiley's consistent refusal to recognize the Union's representative status after the merger made it 'utterly futile — and a little bit ridiculous to follow the grievance steps as set forth in the contract.' • • • In addition, the Union argues that time limitations in the grievance procedure are not compelling because Wiley's violations of the bargaining agreement were 'continuing'."

Recently, in *United Paperworkers v. Misco, Inc.*, ... U.S. ....., 108 S.Ct. 364, 372 (1987), this Court restated its adherence to *Wiley* in the context of considering the ruling of an arbitrator on an evidentiary matter. The existence of a real issue or "procedural" question is clear in *Misco*. This Court nevertheless recognized the power of the lower courts to vacate or remand an arbitration order ". . . in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct . . .", 108 S.Ct. 364, 372, n. 10.

The instant case is indeed a rare instance where the Union has not, prior to its attempt to do so in this Petition, even suggested how Grievance No. 62 could be timely or the time limits

applicable thereto waived. The District Court, in that portion of its Memorandum Opinion which appears at page 14a of the Appendix to the Petition, was therefore correct in concluding as follows:

> "To permit an arbitrator to arbitrate the issue of timeliness where there is no dispute over the facts bearing on the timeliness issue would be to waste the time of the arbitrator and of the parties, and if an arbitrator should erroneously find that this particular grievance was timely filed, the finding would be so manifestly arbitrary and capricious as to require a reviewing court to set it aside. Such a procedural quagmire can hardly comport with the rationale which favors arbitrability."

The District Court's ultimate conclusion, and the affirmance thereof by the Eleventh Circuit, was therefore in accord with principles stated by this Court in, *AT&T Technologies, Inc. v. Communications Workers of America*, ... U.S. ....., 106 S.Ct. 1415 (1986), that whether the Company was bound to arbitrate this particular grievance was a matter to be determined by the court on the basis of the contract entered into by the parties. Based upon the particular facts of this case and the language of the collective bargaining agreement involved, the decisions of the courts below do not appear contrary to this Court's prior decisions.

III. The holding of the courts below does not present a conflict with opinions of other courts of appeal.

The courts below have held only that there was no issue of timeliness, and that the terms of the subject collective bargaining agreement do not require the Company to arbitrate a waived and non-existent grievance.

The majority of the decisions of other courts of appeal, which the Union has cited at pages 16 through 18 of its Petition, have either directly or implicitly recognized the existence of an actual issue deemed procedural. Of those decisions cited by the Union, it appears that the Second, Third, Fifth, Eighth and Ninth Circuits directly noted in their opinions the exis-

tence of facts issues regarding timeliness. *Rochester Telephone Corp. v. Communications Workers*, 340 F.2d 237, 238 (2d Cir. 1965) [Fact issue noted]; *Nursing Home & Hosp. Un., Local 434 v. Sky Vue Terrace*, 759 F.2d 1094, 1097, n. 2 (3rd Cir. 1985) [Court concluded that grievances were timely filed]; *Local 406, Operating Engineers v. Austin Co.*, 784 F.2d 1262, 1264-1265 (5th Cir. 1986) [Union contended that it had no knowledge of alleged contract violation more than 30 days prior to filing grievance]; *Auto. Petr. & Allied Industries Empl. Un. Local 168 v. Town & Country Ford*, 709 F.2d 509, 510, n. 3 (8th Cir. 1983) [Expressly noted issue present]; *Hospital & Inst. Workers v. Marshal Hale Mem. Hosp.*, 647 F.2d 38, 40 (9th Cir. 1981) [Expressly noted issue present].

It also appears that the Fourth and Tenth Circuits, in their decisions relied upon by the Union, implicitly recognized the existence of actual issues. *Tobacco Workers, Local 317 v. Lorillard Corp.*, 448 F.2d 949 (4th Cir. 1971); *Int. Un. Auto Workers v. Folding Carrier Corp.*, 422 F.2d 47 (10th Cir. 1970). Even the Seventh Circuit in *Niro v. Fern International, Inc.*, 827 F.2d 173 (7th Cir. 1987), because of the somewhat unique change in position of the union therein after it was named as a defendant in a hybrid discriminatory failure to represent case, had a basis for recognizing that an issue of timeliness existed.

In the instant case, the District Court recognized fully the Eleventh Circuit's prior decisions in *Shopman's Local 539, Intl. Assn. of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Mosher Steel Company*, 796 F.2d 1361 (11th Cir. 1986) and *Drummond Coal Company v. United Mine Workers of America*, 748 F.2d 1495 (11th Cir. 1984). The District Court found, and the Eleventh Circuit agreed, that both *Mosher Steel* and *Drummond* were distinguishable on their facts, because in both cases the companies' actions had arguably waived their timeliness objections so that there were questions for an arbitrator to decide. In the instant case, there was no question since the Union never even asserted that the grievance was timely, or suggested a color of an argument as to how it could

be deemed timely, or that the time limits thereto could have been determined to have been waived.

The clear non-existence of the issue places this case in a distinguishable category. Similar to the fact situation dealt with in *Philadelphia Printing Pressmen's Un. No. 16 v. International Paper Company*, 648 F.2d 900 (3d Cir. 1981), the Union's omission was total rather than arguable. The Third Circuit's decision in *International Paper Co.* is distinguishable on its facts from that Circuit's more recent pronouncement in *Nursing Home & Hosp., Local 434 v. Sky Vue Terrace*, supra. Similarly, the facts of the instant case are distinguishable from the Eleventh Circuit's prior decisions in *Mosher Steel* and *Drummond Coal*.

The Company respectfully suggests that the split among the Circuits which the Union asserts in support of its Petition is less than well-defined and, in any event, is not put in issue by the narrow holding of the courts below in this case.

CONCLUSION

For the reasons stated herein, this Court should not issue a Writ of Certiorari to review the judgment of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served upon Carl B. Frankel, Counsel of Record for Petitioners, by properly addressed and prepaid U.S. Mail, on this the _____ day of _____, 1988.

_____
Donald W. Davis